

(1934) 10 MAD CK 0050
In the Madras High Court

Seetharama Ayyar and Others

APPELLANT

Vs

Sama Subba Iyer and Others

RESPONDENT

Date of Decision : 12-10-1934

Acts Referred:

Citation : AIR 1935 Mad 445

Hon'ble Judges : Walsh, J

Bench : Division Bench

Judgement

Walsh, J.—The plaintiff filed O.S. No. 226 of 1928 in the Court of the District Munsif of Kollegal for a declaration of his title to his share of the plaintiff-mentioned properties by virtue of a sale-deed from defendant 1, for partition and division of the same by metes and bounds and for possession of the same from defendants. Defendants 1 and 2 are brothers of a joint family. Defendants 3 and 4 are the sons of defendant 2. Defendants 5 to 8 are alienees from defendant 2. The properties in suit consist of three items. Defendant 1 remained ex parte. The Court held that the plaintiff was not entitled to any share in item 1, but was entitled to a half share in item 2 and half of a two-thirds share in item 3 and that the plaintiff is at liberty to apply for the appointment of a commissioner to take an account as to the amount of liability of the family as it stood up to the date of the decree, as also to find out the value of the said family property and that the plaintiff should account for his share of the family debts (defendant I's). The plaintiff preferred an appeal against this preliminary decree but only in the matter of his being made accountable for the payment of debts. The petitioners put in I. A. No. 214 of 1932 asking for permission to raise a new plea as to the non-maintainability of the suit since there was another item of the family property which had not been included in the suit. The lower appellate Court allowed the petition and called for findings from the lower Court on the new issue, viz., "whether the suit is not maintainable for the reasons stated in the petitioner's application I.A. No. 214 of 1932 of this Court."

2. It appears that the plaintiff then asked for leave to amend the plaint by

including the omitted item and that the respondents objected to it saying that the amendment, if accepted, would alter the nature of the suit. Vide para. 5 of the affidavit in I. A. No. 756 of 1932 filed in the appellate Court. While this matter was pending, the plaintiff put in the aforesaid I. A. in the appellate Court asking for permission to abandon his claim with respect to item 3 of property in the suit as originally laid, with liberty to institute a fresh suit in respect of the same. The Court allowed the application and against this order the present revision petition is filed.

3. It is admitted that owing to the decision of the Full Bench in *Kamayya v. Papayya* 1918 Mad 1287 which overruled *Chinna Kotayya v. Varadaraja Appa Rao* 1915 Mad 339, the appellate Court has power to act under Order 23, Rule 1, Civil P. C. It is also not disputed that in a suit by an alienee from a member of an undivided family against an alienee from another member, it is not necessary to sue for partition: vide *Kandaswamo Goundan v. Venkataswamy Goundan* 1933 Mad 774. Consequently, if the plaintiff is allowed to withdraw item 3, in which alone the members of the family besides the alienor are interested, he need not sue for partition nor add the other item of the family property. But the argument raised on behalf of the petitioners is that, except as regards the accountability for debts, on which alone the plaintiff has appealed the preliminary decree has become final, the defendants not having appealed against it, and it is therefore urged that the lower appellate Court had no power to grant the application to withdraw item 3 and bring a fresh suit upon it. In this connexion *Annamalai Chettiar v. Kothayamma* (1912) 14 IC 259 is quoted where at p. 292 (of 38 M. L. W.) it is observed:

In partition suits the power of the plaintiff to withdraw has been limited to this extent, that it can be exercised only till a right in the defendant in the continuance of the suit or its determination in a particular way has been legally created, e. g., by a preliminary decree or a compromise or agreement or award:" vide also *Unni Moyan v. Kothayamma* (1912) 14 IC 259.

4. On the other side a preliminary objection is raised that an order under Order 23, Rule 1 cannot be interfered with in revision. In this connexion *Panchan Lal v. Mohamad Yaqub* 1926 All 294 and *Nannoo v. Roshan Singh* 1924 All 121 which both deal with Order 23, Rule 1 and *Ramakrishna Pillai v. Krishnaswami Pillai* 1922 Mad 321 and *Duncan Stratton and co. v. Goenka Cotton Spinning and Weaving Mills Ltd.* 1927 Lah 847 which deal with the amendment of plaints are also referred to. If however as argued for the petitioner, the preliminary decree had become final excepting with regard to the particular matter on which the plaintiff appealed *Annamalai Chettiar v. Kothapudayar* 1934 Mad 485 is authority for holding that the appellate Court has no jurisdiction to allow an item of the suit to be withdrawn under Order 23, Rule 1 and therefore its order would be open to revision. But to my mind it is clear that when the petitioners put in I. A. 244 of 1932 and the new issue was ordered, the position was entirely changed.

5. The effect of this was to allow them something even more than a memo of

cross-objections and in fact nothing less than a cross appeal, because if the issue is decided favourably to them the suit has to be dismissed and with it the preliminary decree. It is not open therefore to the petitioners " having in substance preferred an appeal against the whole decree, and having had an issue raised on this point to maintain now that the preliminary decree is final except with regard to the particular matter on which the plaintiff has appealed. The whole suit has been reopened by them, and, especially when they themselves opposed the application of the plaintiff to include all the family property in the suit so as to regularise it as a partition suit, it is not for them to urge that the preliminary decree stands when they themselves have got a fresh issue raised which cuts at the root of that decree.

6. The other objection which is raised is that the appellate Court had no power at that stage to grant the plaintiff's request since the appeal was not before it and had been remanded to the trial Court. I cannot agree with this view. All that the appellate Court had done was to call for a finding on the new issue. In my opinion the proper Court-before which this application to withdraw item 3 from suit the with permission to bring a fresh suit upon it was the appellate Court. The order therefore of the lower appellate Court was, I consider, passed with jurisdiction, and I would further say that under the circumstances of the case it was a very proper order to be passed. This revision petition must therefore be dismissed with costs with this note, that the members of the family (defendants 2 to 4) will cease of course to be parties to the suit, which will be confined to the alienees.